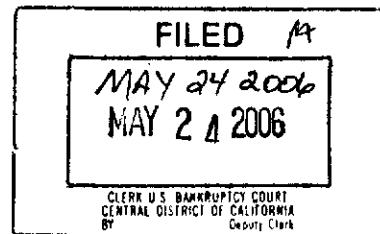


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14  
15 UNITED STATES BANKRUPTCY COURT  
16 CENTRAL DISTRICT OF CALIFORNIA  
17 SANTA ANA DIVISION

18 In re } Case No.: SA 06-10195 JR  
19 LLOYD MYLES RUCKER, } Chapter 7 Case  
20 Debtor. } Adv. No. 8:06-ap-01259-JR

21 DR. RONALD CUNNING, an individual and }  
22 as trustee for the RONALD CUNNING }  
D.D.S., INC. PROFIT SHARING PLAN }  
23 AND TRUST and the CUNNING FAMILY }  
TRUST,

NOTICE OF MOTION AND MOTION FOR  
SUMMARY JUDGMENT PURSUANT TO  
FEDERAL RULE OF CIVIL PROCEDURE  
56; MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT THEREOF

Hearing Information:

DATE: June 28, 2006  
TIME: 1:30 p.m.  
CTRM: 5A

24 Plaintiff,  
25 vs.  
26 LLOYD MYLES RUCKER,  
27 Defendant.

[Statement of Uncontroverted Facts and  
Conclusions of Law and Request for  
Judicial Notice Filed Concurrently  
Herewith]

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1 **TO THE HONORABLE JOHN E. RYAN, UNITED STATES BANKRUPTCY JUDGE,**  
2 **THE OFFICE OF THE UNITED STATES TRUSTEE, THE DEBTOR AND HIS**  
3 **COUNSEL, AND ANY OTHER PARTIES IN INTEREST:**

4 **PLEASE TAKE NOTICE** that on June 28, 2006, at 1:30 p.m. in Courtroom 5A of  
5 the Ronald Reagan Federal Building and United States Courthouse located at 411 W.  
6 Fourth Street, Santa Ana, California 92701, the Court will hold a hearing on the motion of  
7 plaintiffs Ronald A. Cunning, D.D.S., individually and on behalf of the Ronald Cunning  
8 D.D.S., Inc. Profit Sharing Plan and Trust and the Cunning Family Trust, for Summary  
9 Judgment pursuant to Federal Rule of Civil Procedure 56 (the "Motion").

10 **PLEASE TAKE FURTHER NOTICE** that pursuant to Local Bankruptcy Rule 9013-  
11 1(e), any party who opposes the Motion must, no later than twenty-one (21) calendar  
12 days prior to the hearing on the Motion, serve and file a separate concise "statement of  
13 genuine issues" with responding papers setting forth all material facts as to which it is  
14 contended there exists genuine issues required to be litigated, and referencing each fact  
15 to the evidence which establishes the genuine issue to be litigated.

16 **PLEASE TAKE FURTHER NOTICE** that failure to timely respond to the Motion  
17 may be deemed by the Court to be a consent to the granting of the relief sought in the  
18 Motion.

19 **Respectfully submitted,**

20 **DATED: May \_\_\_, 2006**

WEILAND, GOLDEN,  
SMILEY, WANG EKVALL & STROK, LLP

22

By:

KYRA E. ANDRASSY  
Attorneys for Ronald A. Cunning,  
D.D.S., individually and on behalf of  
the Ronald A. Cunning, D.D.S. Inc.,  
Profit Sharing Plan and Trust and the  
Cunning Family Trust

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## MOTION

2 Plaintiffs Ronald A. Cunning, D.D.S., individually and on behalf of the Ronald  
3 Cunning D.D.S., Inc. Profit Sharing Plan and Trust and the Cunning Family Trust  
4 (collectively, the "Plaintiffs"), hereby move the Court for summary judgment, determining  
5 that the state court judgments obtained by the Plaintiffs are entitled to collateral estoppel  
6 effect and that they are nondischargeable under 11 U.S.C. §§ 523(a)(2)(A), (a)(4), and  
7 (a)(6). In support of the Motion, the Plaintiffs submit the following memorandum of points  
8 and authorities, the Statement of Uncontroverted Facts and Conclusions of Law in  
9 support of the Motion, the Request for Judicial Notice and exhibits thereto, and such  
10 other and further evidence and argument as may be submitted at or prior to the hearing  
11 on the Motion, and respectfully represent as follows:

## 13 | I. INTRODUCTION

14 In 1997, after a multi-week trial, a jury rendered verdicts against the Debtor and in  
15 favor of the Plaintiffs that collectively totaled \$3.1 million based on the jury's findings that  
16 the Debtor committed fraud, breach of fiduciary duty, and conversion. The verdicts  
17 included punitive damages based on the jury's findings that the Debtor's conduct was  
18 oppressive, malicious, and fraudulent. The judgments are final. Through this Motion, the  
19 Plaintiffs request that the Court give the state court judgments collateral estoppel effect  
20 and find that the judgments are nondischargeable under 11 U.S.C. §§ 523(a)(2)(A),  
21 (a)(4), and (a)(6).

## 23 II. BACKGROUND FACTS

24 Dr. Cunning is a dentist who also invests in real estate. Dr. Cunning was  
25 introduced to the Debtor and the Debtor's former wife, Lori Rucker, by a local real estate  
26 broker named Christopher Bennett. Based on representations by the Debtor about  
27 several successful real estate projects that he had been involved in, Dr. Cunning agreed  
28 to form two joint ventures with the Debtor to develop and complete two real estate

1 projects in Newport Beach, California. See Statement of Uncontroverted Facts No. 1.  
2 Accordingly, Dr. Cunning, on behalf of the Ronald Cunning D.D.S., Inc. Profit Sharing  
3 Plan and Trust (the "Profit Sharing Plan"), and the Debtor formed a joint venture to  
4 develop and complete a real estate project on 15th Street in Newport Beach. See  
5 Statement of Uncontroverted Facts No. 2. The second project was on 16th Street in  
6 Newport Beach, and the joint venture for that project was formed by the Debtor and  
7 Dr. Cunning on behalf of the Cunning Family Trust. See Statement of Uncontroverted  
8 Fact No. 3. In connection with the real estate projects, the joint ventures obtained  
9 construction loans that Dr. Cunning individually personally guaranteed. See Statement  
10 of Uncontroverted Facts No. 4.

11 After entering into the joint venture agreements with the Debtor and providing the  
12 funding and loans required of him, Dr. Cunning began to experience difficulty in obtaining  
13 financial information and information about the status of the two projects from the Debtor.  
14 Dr. Cunning was then contacted by Christopher Bennett, who claimed that a written  
15 agreement existed between he and the Debtor pursuant to which Mr. Bennett was to  
16 receive a percentage interest in any project that Dr. Cunning pursued with the Debtor.  
17 Mr. Bennett sued the Debtor and Dr. Cunning in Orange County Superior Court (the  
18 "State Court") to enforce the agreement against the Debtor. During this investigation,  
19 Dr. Cunning discovered that the Debtor had engaged in fraud, breach of fiduciary duty,  
20 and conversion. The State Court ultimately ordered an accounting and appointed a  
21 retired judge to act as a referee.

22 The investigation culminated with the State Court's findings that the Debtor had  
23 wrongfully removed funds from the two construction loans guaranteed by Dr. Cunning  
24 and had used the funds to benefit himself personally, to benefit his wife, to fund other  
25 construction projects, and for an unjustified claim for supervision fees. See Statement of  
26 Uncontroverted Facts No. 5. The State Court also found that the Debtor had defrauded  
27 the Cunning Family Trust out of \$100,000 through a double escrow, and that the Debtor  
28 had diverted funds, falsified records, overcharged the joint ventures, and concealed the

1 records and the facts of these wrongful transactions. See Statement of Uncontroverted  
2 Facts No. 6. The State Court found that the Debtor owed \$1,157,641 to the joint  
3 ventures in severable amounts to be determined by a jury. See Statement of  
4 Uncontroverted Facts No. 7.

5 After a jury trial, the jury rendered its verdicts against the Debtor with special  
6 findings, including fraud and deceit, breach of fiduciary duty, fraudulent inducement, and  
7 conversion.<sup>1</sup> Specifically, the jury rendered the following verdicts: (1) a general verdict in  
8 favor of Dr. Cunning individually in the amount of \$391,097 and a special verdict  
9 assessing punitive damages in favor of Dr. Cunning individually in the amount of  
10 \$500,000 (together, the "Cunning Judgment"); (2) a general verdict in favor of the Profit  
11 Sharing Plan in the amount of \$574,631 and a special verdict assessing punitive  
12 damages in favor of the Profit Sharing Plan in the amount of \$500,000 (together, the  
13 "Profit Sharing Plan Judgment"); and (3) a general verdict in favor of the Family Trust in  
14 the amount of \$583,009 and a special verdict assessing punitive damages in favor of the  
15 Family Trust in the amount of \$500,000 (together, the "Family Trust Judgment") (the  
16 Cunning Judgment, the Profit Sharing Plan Judgment, and the Family Trust Judgment  
17 are collectively referred to as the "Judgments"). See Statement of Uncontroverted Facts  
18 Nos. 8, 13, 14, 20, 21, 27. The jury found that the Debtor's conduct was oppressive,  
19 malicious, and fraudulent, and these findings formed the basis for the punitive damage  
20 awards. See Statement of Uncontroverted Facts Nos. 12, 19, and 26. The judgments  
21 are all final.

22 The Debtor filed his voluntary chapter 7 bankruptcy petition on October 12, 2005,  
23 and the Plaintiffs timely filed their complaint under 11 U.S.C. § 523.

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28 <sup>1</sup> The jury also found that the conduct forming the basis for the judgments was a breach of contract,  
although that finding is not at issue in this Motion.

1      III. **LEGAL STANDARD FOR SUMMARY JUDGMENT**

2      A party moving for summary judgment must show "that there is no genuine issue  
3      of material fact and that the Movant is entitled to judgment as a matter of law." Fed. R.  
4      Bankr. P. 7056(c). Summary judgment is mandated "against a party who fails to make a  
5      showing sufficient to establish the existence of an element essential to that party's case,  
6      and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett,  
7      477 U.S. 317, 322 (1986).

8      "Once the moving party meets this burden, the non-moving party must designate  
9      specific facts showing that there is a genuine issue for trial." Hayes v. Palm Seedlings  
10     Partners-A (In re Agricultural Research and Tech. Group, Inc.), 916 F.2d 528, 533-34  
11     (9th Cir. 1990)(citations omitted). In establishing a triable issue of fact, a responding  
12     party must do more than present a scintilla of evidence. Rather, the evidence presented  
13     must be sufficient to allow a reasonable fact-finder to find in the respondent's favor. See  
14     Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

15

16      IV. **THE JUDGMENTS ARE ENTITLED TO COLLATERAL ESTOPPEL EFFECT,**

17      **AND THEY SHOULD BE FOUND TO BE NONDISCHARGEABLE UNDER**

18      **11 U.S.C. §§ 523(a)(2)(A), (a)(4), and (a)(6)**

19      The purpose of collateral estoppel is to avoid repetitious litigation. In applying  
20     collateral estoppel, federal courts are required to "give a state-court judgment the same  
21     preclusive effect as would be given that judgment under the law of the state in which the  
22     judgment was rendered." Younie v. Gonya (In re Younie), 211 B.R. 367, 373 (9th Cir.  
23     BAP 1997)(quoting Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 81 (1984)).

24      Collateral estoppel applies in nondischargeability proceedings. See Grogan v. Garner,  
25      498 U.S. 279, 284-85 n.11, 111 S.Ct. 654, 658, 112 L.Ed.2d 755 (1991). The preclusive  
26     effect of a state court judgment in a subsequent bankruptcy proceeding is determined by  
27     the preclusion law of the state in which the judgment was issued. See Gayden v.

1 Nourbakhsh), 67 F.3d 798, 800 (9th Cir. 1995). Here, the Judgments were issued in  
2 California, so California law on collateral estoppel applies.

3 The application of collateral estoppel in California requires that:

4 (1) The issue sought to be precluded from relitigation must be  
5 identical to that decided in a former proceeding;  
6 (2) The issue must have been actually litigated in the former  
7 proceeding;  
8 (3) It must have been necessarily decided in the former  
9 proceeding;  
10 (4) The decision in the former proceeding must be final and  
11 on the merits; and  
12 (5) The party against whom preclusion is sought must be the  
13 same as, or in privity with, the party to the former proceeding.

14 Younie, 211 B.R. at 373 (citation and internal quotation marks omitted).

15 **A. The Cunning Judgment Is Nondischargeable Under 11 U.S.C.**

16 **§§ 523(a)(2)(A) and (a)(6)**

17 **1. The Cunning Judgment Is Nondischargeable Under**  
**11 U.S.C. § 523(a)(2)(A)**

18 Section 523(a)(2)(A) excepts from discharge any debt "for money, property, an  
19 extension, renewal, or refinancing of credit, to the extent obtained by . . . false pretenses,  
20 a false representation, or actual fraud . . ." 11 U.S.C. § 523(a)(2)(A). This section  
21 requires "only the fact of an adverse fraud judgment, and nothing more . . . for a debt to  
22 be nondischargeable." Muegler v. Bening, 413 F.3d 980, 984 (9th Cir. 2005). All  
23 damages resulting from a debtor's fraud, including punitive damages, are  
24 nondischargeable under this section. See Cohen v. De La Cruz, 523 U.S. 213, 223, 118  
25 S.Ct. 1212, 1219 (1998).

26 In September 1996, the state court signed its general verdict, awarding Cunning,  
27 in his individual capacity, damages of \$391,037. See Statement of Uncontroverted Facts

1 No. 8; General Verdict, attached as Exhibit "2."<sup>2</sup> In awarding Dr. Cunning damages of  
2 \$391,037, the jury found that the Debtor had made a representation to Dr. Cunning as to  
3 a past or existing material fact, that the representation was false, that the Debtor knew  
4 that the representation was false when he made it and made it with the intention of  
5 defrauding Dr. Cunning, that Dr. Cunning acted in reliance upon the truth of the  
6 representation and was justified in doing so, and that the Debtor's misrepresentation  
7 caused Dr. Cunning to suffer damages of \$391,037. See Statement of Uncontroverted  
8 Facts No. 9; Special Findings Fraud and Deceit, attached as Exhibit "3." In a separate  
9 Special Finding, the jury also found that the Debtor had concealed or suppressed a  
10 material fact with the intention of defrauding Dr. Cunning, that Dr. Cunning was unaware  
11 of that fact when he acted and would have acted differently if he had known the truth,  
12 and that the Debtor's concealment of the fact caused Dr. Cunning damages of  
13 \$391,097.00. See Statement of Uncontroverted Facts No. 10; Special Findings Fraud  
14 (Inducement), attached as Exhibit "4." In addition to the compensatory damages of  
15 \$391,097, the jury also awarded Dr. Cunning \$500,000.00 in punitive damages. See  
16 Statement of Uncontroverted Facts No. 13; Special Verdict (Punitive Damages), attached  
17 as Exhibit "7." The punitive damages were awarded in part based on the jury's finding  
18 that the Debtor's conduct was fraudulent within the meaning of California Civil Code  
19 ("CCC") § 3294. See Statement of Uncontroverted Facts No. 12; Special Findings (Clear  
20 and Convincing Evidence; Punitive Damages), attached as Exhibit "6." For the reasons  
21 set forth below, the Cunning Judgment is entitled to collateral estoppel effect and is  
22 nondischargeable under § 523(a)(2)(A).

23 The first element in determining whether it is appropriate to give a judgment  
24 collateral estoppel effect is whether the issue sought to be precluded from relitigation is  
25 identical to that decided in the earlier proceeding. All that is needed to find an identity of  
26 issues under § 523(a)(2)(A) is the fact of an adverse fraud judgment. See Muegler, 413

28 <sup>2</sup> All references to exhibits in this Motion are to the exhibits that are attached to the Request for  
Judicial Notice submitted in connection with the Motion.

1 F.3d at 984. Because the jury found that the Debtor had committed both actual fraud  
2 and fraud in the inducement and that this conduct constituted fraud within the meaning of  
3 CCC § 3294, there is an identity of issues, and the first element of collateral estoppel is  
4 satisfied.

5 Second, the issue of whether the Debtor incurred the Cunning Judgment as a  
6 result of fraud was actually litigated in the State Court. The Debtor was represented by  
7 the law firm of Turner, Cooper & Reynolds, and the matter was tried to a jury over  
8 several weeks and after four years of trial preparation, resulting in the Judgments. The  
9 Debtor was aware that the trial was proceeding and has not contended otherwise. This  
10 is more than sufficient under California law to establish the element that the issue was  
11 actually litigated.<sup>3</sup>

12 Third, the Cunning Judgment was entered after the jury expressly found that the  
13 Debtor had defrauded Dr. Cunning and included a punitive damages award that was  
14 based in part on a finding that the Debtor's conduct was fraudulent. Accordingly, the  
15 issue of fraud was necessarily litigated, and this element is satisfied.

16 Last, the Cunning Judgment is final and non-appealable, and the Debtor and  
17 Dr. Cunning were parties to the litigation leading to the Cunning Judgment and are the  
18 parties before this Court. Thus, the fourth and fifth elements of collateral estoppel are  
19 satisfied.

20 Because all of the elements of collateral estoppel are easily met here and there  
21 are no genuine issues of material fact, there is no reason for the same issues to be  
22 relitigated by the same parties, and the Cunning Judgment is nondischargeable under  
23 11 U.S.C. § 523(a)(2)(A).

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<sup>3</sup> In California, even a default judgment is entitled to collateral estoppel effect as long as the  
28 defendant was personally served with the summons or had actual knowledge of the existence of the  
litigation. See Cal-Micro, Inc. v. Cantrell (In re Cantrell), 329 F.3d 1119, 1124 (9th Cir. 2003). Not only was  
the Cunning Judgment not the result of a default judgment, it was rendered only after a jury trial.

1                   2.    The Cunning Judgment Is Nondischargeable Under  
2                   11 U.S.C. § 523(a)(6)

3                   Section 523(a)(6) excepts from discharge debts "for willful and malicious injury by  
4                   the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6).  
5                   This section is intended to except from discharge debts incurred as a result of a debtor's  
6                   intentional torts. See Kawaauhau v. Geiger (In re Geiger), 523 U.S. 57, 61-62, 118 S.Ct.  
7                   974, 977 (1998). The requirement of a willful injury "is met only when the debtor has a  
8                   subjective motive to inflict injury or when the debtor believes that injury is substantially  
9                   certain to result from his own conduct." In re Su, 290 F.3d 1140, 1142 (9th Cir. 2002). A  
10                  malicious act is a wrongful act, done intentionally, that necessarily causes injury, and is  
11                  done without just cause or excuse. Id. at 1147-48. All damages stemming from a willful  
12                  and malicious injury are nondischargeable under § 523(a)(6). See Britton v. Price (In re  
13                  Britton, 950 F.2d 602, 605-06 (9th Cir. 1991)(abrogated on other grounds by  
14                  Kawaauhau v. Geiger (In re Geiger), 523 U.S. 57 (1998))

15                  As set forth above, the jury found that the Debtor had made a representation to  
16                  Dr. Cunning as to a past or existing material fact, that the representation was false, that  
17                  the Debtor knew that the representation was false when he made it and the Debtor made  
18                  it with the intention of defrauding Dr. Cunning, that Dr. Cunning acted in reliance upon  
19                  the truth of the representation and was justified in doing so, and that the Debtor's  
20                  misrepresentation caused Dr. Cunning to suffer damages of \$391,037. See Statement  
21                  of Uncontroverted Facts No. 9; Special Findings Fraud and Deceit, attached as  
22                  Exhibit "3." In a separate Special Finding, the jury also found that the Debtor had  
23                  concealed or suppressed a material fact with the intention of defrauding Dr. Cunning,  
24                  that Dr. Cunning was unaware of that fact when he acted and would have acted  
25                  differently if he had known the truth, and that the Debtor's concealment of the fact  
26                  caused Dr. Cunning damages of \$391,097.00. See Statement of Uncontroverted Facts  
27                  No. 10; Special Findings Fraud (Inducement), attached as Exhibit "4." In awarding  
28                  punitive damages of \$500,000, the jury also found that this same conduct was malicious,

1 oppressive, and fraudulent within the meaning of CCC § 3294. See Statement of  
2 Uncontroverted Facts No. 12; Special Findings (Clear and Convincing Evidence; Punitive  
3 Damages), attached as Exhibit "6."

4 In order to give the Cunning Judgment collateral estoppel effect and find that it is  
5 nondischargeable under 11 U.S.C. § 523(a)(6), the Court must first find that there is an  
6 identity of issues. As set forth above, under § 523(a)(6), there must be both a subjective  
7 motive to injure and an intentional act that causes injury and that is done without just  
8 cause or excuse in order for there to be a debt incurred by willful and malicious injury.  
9 See Su, 290 F.3d at 1140-42, 1147-48. Both elements are easily satisfied here. In its  
10 findings with respect to fraud, the jury found that the Debtor had made a false  
11 representation about a material fact to Dr. Cunning and had concealed or suppressed a  
12 material fact from Dr. Cunning, doing both with the intention of defrauding Dr. Cunning,  
13 thereby causing Dr. Cunning damages of \$391,097. In addition, the jury found that the  
14 Debtor had committed fraud within the meaning of CCC § 3294(a). CCC 3294 defines  
15 "fraud" as "an intentional misrepresentation, deceit, or concealment of a material fact  
16 known to the defendant with the intention on the part of the defendant of thereby  
17 depriving a person of property or legal rights or otherwise causing injury." Cal. Civ. Code  
18 § 3294(c)(3). Each of these findings satisfies the requirement of § 523(a)(6) that the  
19 Debtor's conduct be done with the subjective motive to inflict injury and also be a  
20 wrongful act, done intentionally, that necessarily causes injury, and that is done without  
21 just cause or excuse. See Su, 290 F.3d at 1140-42, 1147-48; see also Molina v. Seror  
22 (In re Molina), 228 B.R. 248, 251-52 (9th Cir. BAP 1998)(analyzing the Supreme Court's  
23 decision in Geiger and holding that a judgment that included punitive damages for fraud  
24 under CCC § 3294 was entitled to collateral estoppel effect and therefore  
25 nondischargeable under § 523(a)(6)). In addition to the above, in awarding punitive  
damages, the jury expressly found that the Debtor's conduct was oppressive, which is  
defined as "despicable conduct that subjects a person to cruel and unjust hardship in  
conscious disregard of that person's rights." Cal. Civ. Code § 3294(c)(2). This, too, is

1 sufficient to satisfy the requirement that the conduct be malicious. See Petralia v.  
2 Jercich (In re Jercich), 238 F.3d 1202, 1209 (9th Cir. 2001). Accordingly, there is an  
3 identity of issues and the first element of collateral estoppel is satisfied.<sup>4</sup>

4 Second, the issue of whether the Cunning Judgment was awarded as a result of  
5 the Debtor's willful and malicious injury to the Debtor was actually litigated in the State  
6 Court after a jury trial, so this element is met. Because the Cunning Judgment was  
7 entered after the jury expressly found that the Debtor's conduct was intended to harm  
8 Dr. Cunning and done without just cause or excuse, as required by § 523(a)(6), the third  
9 requirement that the issue be necessarily decided is satisfied. Last, the Cunning  
10 Judgment is final and non-appealable and the same parties that were involved in the  
11 State Court are present before this Court, so the fourth and fifth elements of collateral  
12 estoppel are satisfied.

13 Because all of the elements of collateral estoppel are satisfied and there are no  
14 genuine issues of material fact, there is no reason for the parties to relitigate whether the  
15 damages were awarded as a result of willful and malicious injury, and the Cunning  
16 Judgment should be found to be nondischargeable under § 523(a)(6).<sup>5</sup>

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22 <sup>4</sup> In addition, the jury found that the Debtor had committed the tort of conversion by wrongfully  
23 exerting dominion over Dr. Cunning's property, causing Dr. Cunning to suffer damages of \$391,097.00.  
24 See Statement of Uncontroverted Facts No. 11; Special Findings Conversion, attached as Exhibit "5." In  
25 California, conversion is an intentional tort that requires that the plaintiff "show an intention or purpose to  
26 convert the goods and to exercise ownership over them, or to prevent the owner from taking possession of  
27 his property." Collin v. American Empire Ins. Co., 21 Cal. App. 4th 787, 812 (1994). At least one court has  
28 found that this is tantamount to a willful injury within the meaning of § 523(a)(6). See Leonard v. Guillory (In  
re Guillory), 285 B.R. 307, 315-16 (Bankr. C.D. Cal. 2002).

29 <sup>5</sup> The jury also found that the same conduct giving rise to the Cunning Judgment constituted a  
30 breach of the Debtor's fiduciary duty to Dr. Cunning. However, Dr. Cunning has been unable to obtain a  
31 copy of this special finding from the State Court and counsel has been unable to locate it in time to submit it  
32 with this motion. However, Dr. Cunning reserves the right to seek nondischargeability of the Cunning  
33 Judgment under § 523(a)(4) in the future if it becomes necessary to do so.

**B. The Profit Sharing Plan Judgment Is Nondischargeable Under 11 U.S.C. §§ 523(a)(2)(A), (a)(4), and (a)(6)**

**1. The Profit Sharing Plan Judgment Is Nondischargeable  
Under 11 U.S.C. § 523(a)(2)(A)**

5 In awarding the Profit Sharing Plan a judgment of \$574,631, the jury found that  
6 the Debtor had made a representation to Dr. Cunning, in his capacity as trustee of the  
7 Profit Sharing Plan, that the Debtor knew was false when he made it, that the Debtor  
8 made the representation with the intention of defrauding the Profit Sharing Plan, that  
9 Dr. Cunning (again in his capacity as the trustee of the Profit Sharing Plan, justifiably  
10 relied on the representation, and that the misrepresentation caused the Profit Sharing  
11 Plan damages of \$574,631. See Statement of Uncontroverted Facts No. 15; Special  
12 Findings Fraud and Deceit, attached as Exhibit "9." The jury also found that the Debtor  
13 intentionally concealed or suppressed a material fact with the intention of defrauding  
14 Dr. Cunning, in his capacity as the trustee of the Profit Sharing Plan, that Dr. Cunning  
15 was unaware of the fact when he acted on behalf of the Profit Sharing Plan, that  
16 Dr. Cunning would have acted differently if he had known of the fact, and that the  
17 concealment or suppression caused the Profit Sharing Plan damages of \$574,631.00.  
18 See Statement of Uncontroverted Facts No. 16; Special Findings Fraud (Inducement),  
19 attached as Exhibit "10." Because the jury found that the same conduct giving rise to the  
20 fraud judgments was malicious, oppressive, and fraudulent within the meaning of CCC  
21 § 3294(a), it also awarded the Profit Sharing Plan punitive damages of \$500,000. See  
22 Statement of Uncontroverted Facts Nos. 19, 20; Special Findings (Clear and Convincing  
23 Evidence; Punitive Damages), attached as Exhibit "6"; Special Verdict (Punitive  
24 Damages), attached as Exhibit "13." As explained briefly below, the Profit Sharing Plan  
25 Judgment is entitled to the same collateral estoppel effect as the Cunning Judgment and  
26 should be determined to be nondischargeable under § 523(a)(2)(A).<sup>6</sup>

<sup>6</sup> Because both judgments are based on the same facts and are similarly worded, the Plaintiffs will not repeat in detail the analysis contained in Section IV.A. of this Motion, although they did incorporate it by this reference.

1        The first element that must be satisfied in order to give the Profit Sharing Plan  
2 Judgment collateral estoppel effect in this context is that there must be an identity of  
3 issues. As with the Cunning Judgment, because the jury found that the Debtor  
4 committed actual fraud and fraud in the inducement and that his conduct was fraudulent  
5 within the meaning of CCC § 3294, there is an identity of issues and the first factor is  
6 satisfied. See Muegler, 413 F.3d at 984.

7        The second element that must be satisfied is that the issue of whether the Debtor  
8 incurred the Profit Sharing Plan Judgment as a result of fraud must have been actually  
9 litigated in the State Court. As explained above, the judgment was entered after a jury  
10 trial, and accordingly, this element is satisfied.

11        Third, the Profit Sharing Plan Judgment was entered after the jury found that the  
12 Debtor had defrauded the Profit Sharing Plan, and included a punitive damages award  
13 based in part on the jury's finding that the Debtor's conduct with respect to the Profit  
14 Sharing Plan was fraudulent. Accordingly, the issue of fraud was necessarily litigated  
15 and the third element is satisfied.

16        Last, the Profit Sharing Plan is also final and nonappealable, and both the Profit  
17 Sharing Plan and the Debtor were parties to the litigation leading to the Profit Sharing  
18 Plan Judgment and are the parties before the Court in this proceeding. The fourth and  
19 fifth elements required to give the Profit Sharing Plan Judgment collateral estoppel effect  
20 are therefore satisfied.

21        Because all of the elements of collateral estoppel are therefore satisfied and there  
22 are no genuine issues of material fact, the issues do not need to be relitigated, and the  
23 Profit Sharing Plan Judgment should be found to be nondischargeable under  
24 § 523(a)(2)(A).

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**C. The Profit Sharing Plan Judgment Is Nondischargeable Under 11 U.S.C. § 523(a)(4)**

3 Section 523(a)(4) excepts from discharge any debt "for fraud or defalcation while  
4 acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 523(a)(4).  
5 Whether a person is a "fiduciary" under § 523(a)(4) is an issue of federal law which  
6 requires that "[t]he trust giving rise to the fiduciary relationship [ ] be imposed prior to any  
7 wrongdoing; the debtor must have been a 'trustee' before the wrong and without  
8 reference to it." Ragsdale v. Haller (In re Ragsdale), 780 F.2d 794, 796 (9th Cir. 1986).  
9 This requirement is intended to eliminate constructive, resulting, or implied trusts. Id.  
10 Although federal law defines the concept of a fiduciary, state law is relevant to determine  
11 when a trust in a strict sense exists. Id. Parties to a joint venture owe each other a  
12 fiduciary duty. Id. at 796-97 n. 3. All damages stemming from a breach of fiduciary duty,  
13 including punitive damages, are nondischargeable. See Bugna v. McArthur (In re  
14 Bugna), 33 F.3d 1054, 1059-60 (9th Cir. 1994).

15 Here, the State Court found that the Debtor and the Profit Sharing Plan were  
16 parties to a joint venture and the jury found that the Debtor therefore owed a fiduciary  
17 duty to the Profit Sharing Plan and breached that fiduciary duty, causing the Profit  
18 Sharing Plan to suffer damages of \$574,631. See Statement of Uncontroverted Facts  
19 Nos. 2, 17. Because this fiduciary duty is the same as that contemplated by § 523(a)(4),  
20 there is an identity of issues, and the first element required to give the Profit Sharing Plan  
21 Judgment collateral estoppel effect is met.

22 Second, the issue of whether the Debtor breached his fiduciary duty was actually  
23 litigated in State Court because it was adjudicated after a jury trial. Third, the issue was  
24 necessarily decided, as evidenced by the fact that there is a special finding that the  
25 Debtor breached his fiduciary duty to the Profit Sharing Plan. Accordingly, this element  
26 is met. Fourth, the Profit Sharing Plan long ago became a final and nonappealable  
27 judgment, and the same parties that were parties to the matter before the State Court  
28 are present before this Court.

1       Because all of the elements required to give the Profit Sharing Plan Judgment  
2 collateral estoppel effect are satisfied, the Profit Sharing Plan Judgment should be found  
3 to be nondischargeable under § 523(a)(4).

4       1.     **The Profit Sharing Plan Judgment Is Nondischargeable**  
5                   **Under 11 U.S.C. § 523(a)(6)**

6       In connection with the Profit Sharing Plan Judgment, the jury found that the  
7 Debtor had made a false representation of a material fact to Dr. Cunning in his capacity  
8 as trustee of the Profit Sharing Plan, that the Debtor made the representation with the  
9 intention of defrauding the Profit Sharing Plan, that the Profit Sharing Plan justifiably  
10 acted in reliance on the truth of that representation, and that the misrepresentation  
11 caused it damages of \$574,631. See Statement of Uncontroverted Facts No. 15;  
12 Special Findings Fraud and Deceit, attached as Exhibit "9." The jury also found that the  
13 Debtor had concealed or suppressed a material fact from the Profit Sharing Plan with the  
14 intention of defrauding the Profit Sharing Plan, that Dr. Cunning, as trustee of the Profit  
15 Sharing Plan, was unaware of the fact when he acted, that Dr. Cunning would have  
16 acted differently if he had known of the concealed or suppressed fact, and that the  
17 Debtor's concealment or suppression caused the Profit Sharing Plan to suffer damages  
18 of \$574,631. See Statement of Uncontroverted Facts No. 16; Special Findings Fraud  
19 (Inducement), attached as Exhibit "10." Additionally, in awarding the Profit Sharing Plan  
20 punitive damages of \$500,000, the jury found that the same conduct was malicious,  
21 oppressive, and fraudulent within the meaning of CCC § 3294. See Statement of  
22 Uncontroverted Facts Nos. 19, 20.

23       In order to give the Profit Sharing Plan Judgment collateral estoppel effect and  
24 find that it is nondischargeable under § 523(a)(6), the Court first must find that there is an  
25 identity of issues. Section 523(a)(6) requires that the debt be incurred as a result of the  
26 debtor's subjective motive to inflict injury or because the debtor believed that injury was  
27 substantially certain to result from his conduct. See Su, 290 F.3d at 1142. The debt  
28 must also be the result of a wrongful act, done intentionally, that necessarily causes

1 injury, and that is done without just cause or excuse. Id. at 1147-48. Both elements are  
2 met here because the jury found that the Debtor made a false representation of a  
3 material fact and also concealed or suppressed a material fact with the intention of  
4 defrauding the Profit Sharing Plan, thereby causing it to suffer damages of \$574,631.  
5 The jury also found that the Debtor committed fraud within the meaning of CCC § 3294,  
6 which requires that the fraud occur "with the intention on the part of the defendant of  
7 thereby depriving a person of property or legal rights or otherwise causing injury." Cal.  
8 Civ. Code § 3294(c)(3). All three of these satisfy the requirement of § 523(a)(6) that the  
9 Debtor's conduct be done with the subjective motive to inflict injury and that the act be  
10 wrongful, done intentionally, necessarily cause injury, and be done without just cause of  
11 excuse. See Su, 290 F.3d at 1140-42, 1147-48; Molina, 228 B.R. at 251-52). In  
12 addition, the jury found that the Debtor's conduct with respect to the Profit Sharing Plan  
13 was oppressive, which is also sufficient to satisfy the requirement that the conduct be  
14 malicious. See Jercich, 238 F.3d at 1209. As a result, there is an identity of issues, and  
15 the first requirement is met.<sup>7</sup>

16 The remaining elements required to give the Profit Sharing Plan Judgment  
17 collateral estoppel effect are easily satisfied. First, the Profit Sharing Plan Judgment was  
18 awarded as a result of the Debtor's willful and malicious injury after a jury trial in the  
19 State Court, so the requirement that the issue be actually litigated is met. Next, the Profit  
20 Sharing Plan Judgment was entered after the jury expressly found that the Debtor's  
21 conduct was intended to harm the Profit Sharing Plan and was done without just cause  
22 or excuse, so the third element that the issue be necessarily decided is satisfied. Last,  
23 the Profit Sharing Plan Judgment is final and non-appealable and the same parties are  
24 involved, so the fourth and fifth elements are satisfied.

25  
26  
27 <sup>7</sup> In addition, the jury found that the Debtor had committed the tort of conversion with respect to the  
28 Profit Sharing Plan. See Statement of Uncontroverted Facts No. 18; Special Findings Conversion, attached  
as Exhibit "12." This may provide additional evidence that the Family Trust Judgment was the result of the  
Debtor's willful and malicious injury. See Guillory, 285 B.R. at 315-16.

1 Because all of the elements of collateral estoppel are met and there are no  
2 genuine issues of material fact, the Profit Sharing Plan Judgment is entitled to be given  
3 collateral estoppel effect and should be found to be nondischargeable under § 523(a)(6).

4

5 **D. The Family Trust Judgment Is Nondischargeable Under 11 U.S.C.**

6 **§§ 523(a)(2)(A), (a)(4), and (a)(6)**

7 **1. The Family Trust Judgment Is Nondischargeable Under**

8 **11 U.S.C. § 523(a)(2)(A)**

9 In reaching its verdicts with respect to the Family Trust, the jury reached the same  
10 conclusions that it did with respect to Dr. Cunning and the Profit Sharing Plan.

11 Specifically, the jury again found that the Debtor had made a false representation to  
12 Dr. Cunning, in his capacity as trustee of the Family Trust, that the Debtor made the  
13 misrepresentation with the intention of defrauding the Family Trust, that the Family Trust  
14 justifiably acted in reliance on the truth of the representation, causing the Family Trust to  
15 suffer damages of \$583,009. See Statement of Uncontroverted Facts No. 22; Special  
16 Findings Fraud and Deceit, attached as Exhibit "15." The jury also found that the Debtor  
17 had concealed or suppressed a material fact from Dr. Cunning in his capacity as the  
18 trustee of the Family Trust with the intention of defrauding the Family Trust, that the  
19 Family Trust would have acted differently if it had known of the concealed or suppressed  
20 fact, and that the Debtor's concealment or suppression caused the Family Trust to suffer  
21 damages of \$583,009. See Statement of Uncontroverted Facts No. 23; Special Findings  
22 Fraud (Inducement), attached as Exhibit "16." Last, the jury found that the Debtor's  
23 conduct with respect to the Family Trust was fraudulent within the meaning of CCC  
24 § 3294, and awarded punitive damages of \$500,000 in favor of the Family Trust. See  
25 Statement of Uncontroverted Facts Nos. 26 and 27; Special Findings (Clear and  
26 Convincing Evidence; Punitive Damages) and Special Verdict (Punitive Damages),  
27 attached as Exhibits "6" and "19," respectively. For the reasons set forth below, the

1 Family Trust Judgment is entitled to collateral estoppel effect and should be determined  
2 to be nondischargeable under § 523(a)(2)(A).

3 The first element to determine whether it is entitled to collateral estoppel effect is  
4 whether there is an identity of issues. Given the three separate adverse findings of fraud  
5 detailed above, this element is easily satisfied. See Muegler, 413 F.3d at 984.

6 The second element is whether the issue was actually litigated in the State Court.  
7 Because the Family Trust Judgment was rendered after a trial before a jury, this issue is  
8 also met.

9 Third, the Family Trust Judgment was entered after the jury expressly found that  
10 the Debtor had committed the torts of fraud and deceit and fraud in the inducement and  
11 that the Debtor's conduct constituted fraud within the meaning of CCC § 3294. Because  
12 these are express findings, the issue of fraud was necessarily litigated and the third  
13 element is satisfied.

14 Last, the Family Trust Judgment is final and non-appealable, and the same parties  
15 are involved.

16 Because all of the elements of collateral estoppel are satisfied, the Family Trust  
17 Judgment is entitled to be given collateral estoppel effect and should be found to be  
18 nondischargeable under § 523(a)(2)(A).

19 **2. The Family Trust Judgment Is Nondischargeable Under**  
20 **11 U.S.C. § 523(a)(4)**

21 As explained above, § 523(a)(4) excepts from discharge debts incurred as a result  
22 of a debtor's breach of fiduciary duty. Parties to a joint venture owe one another a  
23 fiduciary duty. See Ragsdale, 780 F.2d at 796-97 n.3. Here, the State Court found that  
24 the Debtor and the Family Trust were parties to a joint venture with respect to the real  
25 estate project on 16th Street in Newport Beach, and the jury found that the Debtor  
26 therefore owed the Family Trust a fiduciary duty and breached it. See Statement of  
27 Uncontroverted Facts Nos. 3, 24; Special Findings Fiduciary Duty, attached as  
28 Exhibit "17." Because this fiduciary duty is the same as that required by § 523(a)(4),

1 there is an identity of issues, and the first element required to give the Family Trust  
2 Judgment collateral estoppel effect under § 523(a)(4) is satisfied.

3 The second element requires that the issue of whether the Debtor breached his  
4 fiduciary duty have been actually litigated. Because the jury made this finding after a trial  
5 that the Debtor was certainly aware of, this element is satisfied.

6 Third, the issue of whether the Debtor breached his fiduciary duty must have been  
7 necessarily decided. This element is met because the jury made an express finding that  
8 the Debtor breached his fiduciary duty to the Family Trust, causing it to suffer damages  
9 of \$583,009. Last, the Family Trust Judgment is final and non-appealable, and the same  
10 parties that were parties to the Family Trust Judgment are parties to this action.

11 Accordingly, the Family Trust Judgment is entitled to collateral estoppel effect and  
12 should be determined to be nondischargeable under § 523(a)(4).

13       **3. The Family Trust Judgment Is Nondischargeable Under**  
14       **11 U.S.C. § 523(a)(6)**

15 As explained in detail above, debts incurred as a result of a willful and malicious  
16 injury by the debtor are nondischargeable under § 523(a)(6). See 11 U.S.C. § 523(a)(6).  
17 Here, the jury found that the Debtor had made a false representation of a material fact to  
18 Dr. Cunning in his capacity as trustee of the Family Trust, that the Debtor made the  
19 misrepresentation with the intention of defrauding the Family Trust, that the Family Trust  
20 justifiably relied on the truth of that representation, and that the misrepresentation  
21 caused it damages of \$583,009. See Statement of Uncontroverted Facts No. 22;  
22 Special Findings Fraud and Deceit, attached as Exhibit "22." The jury also found that the  
23 Debtor had concealed or suppressed a material fact from Dr. Cunning, in his capacity as  
24 trustee of the Family Trust, with the intention of defrauding the Family Trust, that the  
25 Family Trust would have acted differently if it had known of the concealed or suppressed  
26 fact, and that this concealment caused the Family Trust to suffer damages.

27 See Statement of Uncontroverted Facts No. 23; Special Findings Fraud (Inducement),  
28 attached as Exhibit "16." Last, the jury found that the Debtor's conduct constituted fraud,

1 within the meaning of CCC § 3294, which requires that there be an "intention on the part  
2 of the defendant of thereby depriving a person of property or legal rights or otherwise  
3 causing injury." Cal. Civ. Code § 3294(c)(3); see Statement of Uncontroverted Facts  
4 Nos. 26, 27. As with the Cunning Judgment and the Profit Sharing Plan Judgment, each  
5 of these three findings satisfies the requirement of § 523(a)(6) that the Debtor's conduct  
6 be done with the subjective motive to inflict injury and that the act be wrongful, done  
7 intentionally, necessarily cause injury, and be done without just cause or excuse.  
8 See Su, 290 F.3d at 1140-42, 1147-48; Molina, 228 B.R. at 251-52. In addition, the jury  
9 also found that the Debtor's conduct with respect to the Family Trust was oppressive,  
10 which is also sufficient to satisfy the requirement that the conduct be malicious. See  
11 Jercich, 238 F.3d at 1209. Accordingly, there is an identity of issues, and the first  
12 requirement is met.<sup>8</sup>

13 The remaining elements required to give the Family Trust Judgment collateral  
14 estoppel effect are also satisfied. First, it was awarded after a jury trial in State Court, so  
15 the requirement that the issue be actually litigated is met. Second, the Family Trust  
16 Judgment was entered after the jury expressly found that the Debtor's wrongful conduct  
17 was intended to injure the Family Trust and was done without just cause or excuse, so  
18 the issue was necessarily decided. Last, the Family Trust Judgment is final and  
19 non-appealable, and the same parties that were before the State Court are before this  
20 Court.

21 Because each of the elements required to give the Family Trust Judgment  
22 collateral estoppel effect under § 523(a)(6) are met, the Family Trust Judgment should  
23 be found to be nondischargeable under § 523(a)(6).

24  
25  
26  
27 <sup>8</sup> In addition, the jury found that the Debtor had committed the tort of conversion with respect to the  
28 Family Trust. See Statement of Uncontroverted Facts No. 25; Special Findings Conversion, attached as  
Exhibit "18." This may provide additional evidence that the Family Trust Judgment was the result of the  
Debtor's willful and malicious injury. See Guillory, 285 B.R. at 315-16.

1 V. **CONCLUSION**

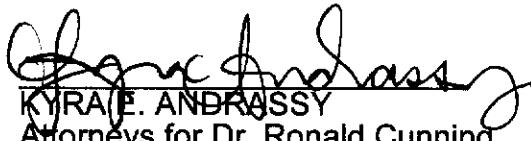
2 Based on the foregoing, the Plaintiffs request that the Court find that the  
3 Judgments are entitled to collateral estoppel effect and therefore nondischargeable  
4 under § 523 as follows:

- 5 1. The Cunning Judgment is nondischargeable under 11 U.S.C.  
6 §§ 523(a)(2)(A) and (a)(6); and
- 7 2. The Profit Sharing Plan Judgment is nondischargeable under 11 U.S.C.  
8 §§ 523(a)(2)(A), (a)(4), and (a)(6); and
- 9 3. The Family Trust Judgment is nondischargeable under 11 U.S.C.  
10 §§ 523(a)(2)(A), (a)(4), and (a)(6).

11 Respectfully submitted,

12 DATED: May 24, 2006

13  
14 WEILAND, GOLDEN,  
15 SMILEY, WANG EKVALL & STROK, LLP

16 By: 

17 KYRA E. ANDRESSY  
18 Attorneys for Dr. Ronald Cunning,  
19 an individual and as trustee for the  
20 Ronald Cunning D.D.S., Inc. Profit  
21 Sharing Plan and Trust and the  
22 Cunning Family Trust

## PROOF OF SERVICE

STATE OF CALIFORNIA.

## COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 650 Town Center Drive, Suite 950, Costa Mesa, California 92626.

On May 24, 2006, I served the foregoing document described as **NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 56; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

see attached list

BY MAIL

[ ] I deposited such envelope in the mail at Costa Mesa, California. The envelope was mailed with postage thereon fully prepaid.

I deposited such envelope with the firm for collection and processing. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day with postage thereon fully prepaid at Costa Mesa, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on May 24, 2006, at Costa Mesa, California.

(State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

(Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. I declare under the penalty of perjury under the laws of the United States of America that the above is true and correct.

Margaret Sciesinski  
Type or print name

Mayast K.D.

**Dr. Ronald Cunning (Family Trust) v. Lloyd Myles Rucker**  
**Adv. No. 8:06-ap-01259 JR**  
**523 Complaint List**

**SERVICE LIST:**

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